TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION, APPELLANT,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED SEPTEMBER 23, 1958

JURISDICTION NOTED NOVEMBER 24, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Appellate Division of the Supreme Court of New York, Third Judicial Department		
Statement under Rule 234	1	1
Proceedings in the Supreme Court of the State of New York, County of Albany	7	1
Petition for order granting review	7	1
Exhibit "A"—Petition to the Board of Regents	14	6
Exhibit "A"—Letter dated May 7, 1956 from Motion Picture Division of the University of the State of New York to Kingsley International Pictures Corp.	21	10
Exhibit "B"—Answer to the petition to the Board of Regents	23	11
Exhibit "C"—Opinion and order of the Board of Regents	28	15

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 6, 1959

	Original	Print
Proceedings in the Supreme Court of the State of New York, County of Albany—Continued		
Petition for order granting review—Continued		
Affidavit of Victor Weybright in support of petition	30	17
Stipulation amending petition to the Supreme Court	32	18
Answer of the Board of Regents to the Petition to the Supreme Court	33	18
Exhibit 5—Extract from Journal of Board of Regents Meeting of September 28, 1956	38	21
Stipulation as to facts	39	21
Stipulation with respect to exhibits	42	23
Appellate Division order appealed from	47	24
Decision	50	26
Opinion of the Appellate Division, Coon, J.	51	27
Proceedings in the Court of Appeals of the State of New York	56	30
Opinion, Conway, C.J.	56	30
Opinion, Desmond, J., concurring	68	45
Dissenting opinion, Dye, J.	71	49
Dissenting opinion, Fuld, J.	74	52
Dissenting opinion, Van Voorhis, J.	75	54
Remittitur	77	55
Judgment on remittitur	81	57
Notice of appeal to Supreme Court of the United States	83	59
Order noting probable jurisdiction	87	62

[fol. 1]

APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION, Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondents.

STATEMENT UNDER RULE 234.

Proceeding to review, pursuant to Article 78 of the Civil Practice Act, a determination of the Regents and of the Motion Picture Division of the New York State Education Department refusing a license for the exhibition of the film "Lady Chatterley's Lover" and for an order, judgment or decree declaring that the sections of Part II of Article 3 of the Education Law of the State of New York contravene the Constitution of the United States and the Constitution of the State of New York and are, therefore, null and void.

The parties are as stated above and there has not been any change of parties or attorneys since the commencement of this action on October 11, 1956.

[fol. 7]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF ALBANY

PETITION TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR ORDER GRANTING REVIEW—October 11, 1956

To the Supreme Court of the State of New York:

The petition of Kingsley International Pictures Corporation respectfully alleges:

1. Kingsley International Pictures Corporation (hereafter referred to as Kingsley) is a corporation organized and existing under the laws of the State of New York, with its principal offices at 1501 Broadway, New York City, New York.

2. At all times hereinafter mentioned, Petitioner was and still is engaged in the business of distributing motion picture films, which business consists of purchasing motion picture films and the right to exhibit such films publicly and the leasing of films for profit to owners and operators of theatres in the United States and its territories.

3. Heretofore Petitioner acquired the exhibition rights to the motion picture film "Lady Chatterley's Lover" (sometimes hereinafter referred to as "the picture" and sometimes as "the film"), and Petitioner at all times hereinafter mentioned had and still has the sole right to exhibit the film or to lease it for exhibition in the State of New York.

4. The film is based on the novel of the same name by D. H. Lawrence, one of the greater writers of the twentieth century. The film is a faithful translation to the medium of [fol. 8] moving pictures of the expurgated version of the novel, which version is freely sold and purchased at book stores and news stands in the State of New York.

5. Prior to May 7, 1956, Petitioner applied, pursuant to Article 3 of the Education Law of the State of New York, to the Motion Picture Division of the New York State Education Department, (hereafter referred to as the "Division") for a license to publicly exhibit the picture for pay in the State of New York.

6. On May 7, 1956, the Division refused Petitioner a license to exhibit the film as submitted unless three specified scenes or sequences were deleted.

7. On or about May 31, 1956, Petitioner requested the Regents to review the aforesaid denial of a license for the exhibition of the film and thereafter on September 28, 1956, the Regents affirmed the determination of the Division on the ground that the three sequences objected to by the Division are immoral and on the further ground that the picture as a whole is immoral.

8. Attached hereto and made part hereof are:

(1) the Petition of Petitioner to the Regents requesting review of the Division's denial of the license for the exhibition of "Lady Chatterley's Lover," (designated as Exhibit A);

(2) the Answer of the Director of the Division to the aforementioned Petition to the Regents, (designated Exhibit B); and

[fol. 9] (3) the order of the Regents affirming the action of the Division and denying a license for the exhibition of the film (designated Exhibit C).

The film itself, the script and the application for a license are also made part of this Petition as if physically attached hereto. And the allegations of petitioner in Exhibit A are here iterated and realleged with the same force and effect as if herein set forth in full.

9. On information and belief, the license fees collected by the Division pursuant to section 126 of the Education Law of the State of New York are in excess of the amount expended in administering the motion picture licensing system provided for in Part II of Article 3 of the Education Law.

10. As a result of the determination made by the Regents and the Division that the film "Lady Chatterley's Lover" is immoral, petitioner may not exhibit the film publicly for profit, or sell, lease or lend the same for exhibition at any theatre in the State of New York.

11. Petitioner contends:

(1) The determination by the Regents that the film "Lady Chatterley's Lover" is "immoral" is arbitrary, unwarranted, unreasonable and unjust.

(2) That determination by the Division and the Regents that the 3 sequences referred to in the letter [fol. 10] of the Division dated May 7, 1956 attached to Exhibit A are "immoral," is arbitrary, unwarranted, unreasonable and unjust.

(3) The Division and the Regents erred in failing to consider the film's artistic merit and sincerity of purpose.

(4) Part II, of Article 3, of the Education Law of the State of New York, pursuant to which the Division and the Regents refused a license for the exhibition of "Lady Chatterley's Lover," provides for a system of licensing and prior censorship of communications and the press, and therefore contravenes the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, section 8, of the Constitution of the State of New York.

(5) Sections 122 and 122-a of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 8, of the New York State Constitution in that they permit the suppression of moving pictures that present opinions unacceptable to the Division or to the Regents.

(6) Section 122 of the Education Law of the State of New York which, in effect, provides that a motion picture film found to be "immoral" shall not be licensed for exhibition, and Section 122-a of the Education Law of the State of New York which purports to define the term "immoral" as used in Section 122, are so vague [fol. 11] and indefinite that their enforcement and application in this case deprived Petitioner of property rights without Due Process of Law, and the said statutes are void, being in violation of the Fourteenth Amendment to the Constitution of the United States and of Article 1, Section 6, of the Constitution of the State of New York.

(7) Section 126 of the Education Law of the State of New York, which provides for the payment of fees for licenses to exhibit motion picture films in the State of New York, imposes a tax on the right of communication by means of motion picture films, and therefore violates the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, section 8 of the Constitution of the State of New York.

13. No previous application for the order herein requested or the relief herein sought has been made to any other court or judge.

Wherefore, petitioner respectfully prays:

(1) For a review under Article 78 of the Civil Practice Act of the determination and order of the Regents and of the Motion Picture Division refusing a license for the exhibition of the film "Lady Chatterley's Lover;"

(2) For an order annulling the determinations of the Regents and the Motion Picture Division;

(3) For an order, judgment or decree declaring that the sections of Part II of Article 3 of the Education [fol. 12] Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States and sections 6 and 8 of Article 1 of the Constitution of the State of New York, and are therefore null;

(4) For an order directing that upon the answer and the return of the Respondents being filed, the proceedings be transferred for disposition to a term of the Appellate Division of the State of New York, for the Third Department; and

(5) For such other and further relief as to the Court may seem just and proper.

Dated: New York, October 11th, 1956.

Yours, etc.,

Kingsley International Pictures Corporation, By (sgd) Edward Kingsley, President.

London, Simpson & London, Attorneys for Petitioner, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

[fol. 14]

EXHIBIT A TO PETITION

PETITION TO THE REGENTS

Appeal to the Board of Regents

by

KINGSLEY INTERNATIONAL PICTURES CORPORATION

From the Determination of the Director of the Motion Picture Division to deny a license for the exhibition of the film "LADY CHATTERLEY'S LOVER".

TO THE BOARD OF REGENTS:

The Petitioner, KINGSLEY INTERNATIONAL PICTURES CORPORATION, respectfully alleges:

1. KINGSLEY INTERNATIONAL PICTURES CORPORATION (hereafter referred to as Kingsley) is a corporation organized and existing under the laws of the State of New York, with its principal offices at 1501 Broadway, New York City, New York.

2. KINGSLEY is the owner of the right to exhibit the motion picture "LADY CHATTERLEY'S LOVER" in the United States.

3. Pursuant to Article 3, Part II, of the Education Law, and the Regents' Rules & Regulations for Review & Licensing of Motion Pictures, KINGSLEY duly applied to the Mo- [fol. 15] tion Picture Division of the State Education Department (hereafter referred to as the Division) for a license to exhibit the film "LADY CHATTERLEY'S LOVER" in the State of New York. The application for a license was accompanied by the film script and a certified check in the amount of the license fee.

4. On May 7, 1956, the Acting Director of the Division directed the elimination of certain views, sequences, dialogue and super-imposed titles from "LADY CHATTERLEY'S

LOVER" on the ground that they are "immoral." A copy of the letter directing the deletions is annexed hereto and made part hereof as Exhibit "A". Such letter is in effect a notice that a license will not be issued unless the views are eliminated.

5. Petitioner seeks a review by the Board of Regents of the Division's refusal to license the picture "LADY CHATTERLEY'S LOVER." The review is sought on the grounds:

(a) That the views, sequences, dialogue and titles objected to by the Division are not immoral within the meaning of Sections 122 and 122-a of the New York Education law;

(b) That the standards by which the Division judged "LADY CHATTERLEY'S LOVER" are improper;

(c) That the Division exceeded its authority in denying a license for the exhibition of "LADY CHATTERLEY'S LOVER";

(d) That the Division, in directing the deletion of the parts of the film listed in Exhibit A, acted inconsistently, arbitrarily and capriciously.

[fol. 16] 6. Petitioner believes that the film "LADY CHATTERLEY'S LOVER" is moral in its theme, and in the manner of presentation, and that none of its parts, including those objected to by the Division, is immoral. It deals with the relationships of a woman (Lady Chatterley) with her husband (Sir Clifford Chatterley) and with her lover (Mellors). The husband is physically crippled and spiritually corrupt. The lover is a symbol of the simple, decent and natural man. In the denouement, Lady Chatterley, unable to secure her husband's consent to divorce, sacrifices wealth and social status to go with Mellors. Her relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage. The solution of similar problems in a number of pictures approved by the Division, is the death of the husband by fortuitous accident, suicide or murder. It is submitted that "LADY CHATTERLEY'S LOVER" is more honest and moral than such films approved and licensed by the Division without reservation.

The scenes between Lady Chatterley and Mellors objected to by the Division are clearly not lewd. It must be assumed that the Division takes exception to them because the protagonists are unmarried. The determination that the relationship between Lady Chatterley and Mellors is improper was arrived at without regard to the intent or purpose of the film. Such determination involves a judgment with respect to the mores of the community that the Division is not qualified or legally authorized to make.

7. The Division erred in judging the entire film on the basis of a few isolated passages. It is submitted that a [fol. 17] film must be judged as an entirety, and that is particularly true where the basis for judgment is a moral one. Judged by isolated passages taken out of context, the Bible would be found immoral and obscene. The Division does not claim that the picture as a whole—or that its effect—is immoral. It may not, therefore, ban the picture because of objection made to a very minor part of it.

8. The Division exceeded the limits of its authority in refusing a license for the exhibition of "LADY CHATTERLEY'S LOVER." In the most recent and controlling decision on the question (*Capitol Enterprises, Inc. v. The Regents*), the Appellate Division for the Third Department limited the power of the Division to reject an application for license to exceptional, or flagrant cases. Certainly, "LADY CHATTERLEY'S LOVER" does not present such a case. Its purpose is sincere. It is presented with taste—and artistry. There is no exploitation of nudity or of the sensational. And even the objections to it listed by the Division are relatively minor ones. The Division's rejection of the request to license the picture was, therefore, in direct violation of the law.

9. The Division acted arbitrarily, inconsistently and capriciously in demanding the elimination of the portions of the film listed in Exhibit A. In countless instances, the Division has licensed films containing sequences that it declared objectionable in this film. A few such films, to list those that immediately come to mind, are "A Husband for Anna," "Devil in the Flesh," "Eternal Return," and "Marie Duport."

[fol. 18] 10. Petitioner also contends that the statutes and regulations providing for the submission of films for license, and their application in this case, violate the rights guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 6 and 8 of Article I of the Constitution of the State of New York. In the event the decision of the Division to ban "LADY CHATTERLEY'S LOVER" is upheld by the Regents, Petitioner will seek an order or decree, from the court having jurisdiction, declaring that the New York film censorship law (Sections 122 and 122-a of the New York Education Law) contravenes the Constitution of the United States and the Constitution of the State of New York, and is, therefore, null and void.

11. In the exercise of its editorial judgment and to enhance the artistic quality of the film, Petitioner has deleted certain material from the version of "LADY CHATTERLEY'S LOVER" submitted to the Division. The deletions include a small part of the matter in Reel 3D objected to by the Division. Petitioner requests the Regents, in reviewing the action of the Division, to consider the version as revised by Petitioner. If the request is denied, Petitioner will present to the Regents the version submitted to the Division. The regents are also respectfully requested, in reviewing the determination of the Division, to take cognizance of the rule (enunciated in *Capitol Enterprises, Inc.* v. *The Regents*) that the burden is on the Division to justify its refusal to license the exhibition of the picture "LADY CHATTERLEY'S LOVER."

[fol. 19] 12. For the reasons outlined, Petitioner requests the BOARD OF REGENTS to direct the issuance of a license for the exhibition of the motion picture "LADY CHATTERLEY'S LOVER."

Dated, New York, May 31, 1956.

KINGSLEY INTERNATIONAL PICTURES CORPORATION

By (sgd) EDWARD L. KINGSLEY

EDWARD L. KINGSLEY
President

[fol. 21]

EXHIBIT A TO EXHIBIT "A" TO PETITION

EXHIBIT ATTACHED TO PETITION TO THE REGENTS

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

Motion Picture Division
State Building
80 Centre Street
New York 13, N. Y.

May 7, 1956

HELEN H. KELLOGG, Acting Dir.

KINGSLEY INTERNATIONAL PICTURES CORP.
1501 Broadway
New York 36, New York

Re: *"Lady Chatterley's Lover"*
(French with English Titles)

Attn: *Mr. Edward L. Kingsley*

Gentlemen:

The motion picture identified above has been examined by this Division under the provisions of Section 122 of the State Education Law.

In accordance with the report and recommendations of our Reviewers, the following eliminations are directed to be made in all prints to be exhibited in the State of New York.

REEL 2D:

Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress, to end of sequence.

[fol. 22] REEL 3D:

Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:

"Mais tu es nue . . .	"But you're nude . . .
Tue es nue sous ta robe,	you're nude under your
et tu ne le disais pas . . .	dress, and you didn't
Qu'est-ce que tu as?"	say so . . . What is it?".

Eliminate accompanying English superimposed titles:

"You have nothing on . . ."
"And you didn't say so . . ."
"What is it?"

REEL 4D:

Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.

REASON: "Immoral" within the intent of our Law.

When the prescribed eliminations have been made, please return reels 2D, 3D and 4D to us for rescreening.

Very truly yours,

(Sgd.) HELEN H. KELLOGG
Acting Director

[fol. 23]

EXHIBIT B TO PETITION

ANSWER TO THE PETITION TO THE REGENTS

IN THE MATTER

of the

Appeal from the action of the Acting Director of the Motion Picture Division in refusing to license for general exhibition a motion picture entitled:

"LADY CHATTERLEY'S LOVER"

TO THE BOARD OF REGENTS:

HELEN H. KELLOGG, Acting Director of the Motion Picture Division of the State Education Department, here-

inafter referred to as the Division, for answer to the appeal herein, admits, denies and alleges as follows:

1. Denies any knowledge to the identity and place of business of the petitioner other than that contained in the application of Kingsley International Pictures Corp., (hereinafter referred to as Kingsley), for the licensing for general exhibition of the motion picture "LADY CHATTERLEY'S LOVER."

2. Denies any knowledge as to the identity of the signer of the petition other than that contained in statements in the application of Kingsley International Pictures Corp.

3. Admits the allegations contained in paragraph numbered 3 of the petition on appeal.

[fol. 24] 4. Admits the allegations contained in paragraph numbered 4 of the petition on appeal.

5. Denies the allegations as contained in paragraph numbered 5a, 5b, 5c and 5d of the petition on appeal herein and alleges:

(a) That the views, sequences, dialogue and titles objected to by the Division are immoral within the meaning of Section 122 and 122-a of the New York State Education Law;

(b) That the action taken by the Division in directing that eliminations be made in "LADY CHATTERLEY'S LOVER" is proper and consistent with the provisions of Section 122 and 122-a of the New York State Education Law;

(c) That the Division exercised a proper authority in directing the elimination of those portions of the film which contravene the statute, and

(d) That the Division in directing the elimination of the parts of the film listed in petitioner's Exhibit A of the petition acted neither inconsistently, arbitrarily nor capriciously and that said action is in fact mandatory under Section 122 and 122-a of the New York State Education Law.

6. With respect to paragraph numbered 6 of the petition, denies knowledge or information sufficient to form a belief as to petitioner's allegation that he believes the film "LADY CHATTERLEY'S LOVER" is moral in its theme, and further denies all other allegations in this paragraph, except admits [fol. 25] that this is a story of a young woman, Lady Chatterley, and her relationship with Sir Clifford Chatterley, her crippled husband, and her lover Mellors, a young gamekeeper of their estate. Sir Clifford because of war injuries is impotent. He informs his wife that he would wish her to have a child by another man so that he could have an heir to inherit his title and estate. Lady Chatterley at first resents the idea of having a purely sexual relationship with another man. Nevertheless she finds herself physically attracted to their gamekeeper, Mellors, and becomes involved in a protracted, illicit love affair with him. There ensue several clandestine meetings, as a result of which Lady Chatterley becomes pregnant with Mellors' child. Despite a temporary quarrel with Mellors, Lady Chatterley is so strongly attracted to him that she decides to leave her husband. Denying Lady Chatterley's request for a divorce, Sir Clifford demands that she allow him to acknowledge the expected child as his, to raise a "Chatterley." She refuses, and leaves to live with her lover, Mellors.

In requesting eliminations, the Division was concerned only with those portions of the film which constituted a portrayal of immorality within the meaning of Section 122 and 122-a of the New York State Education Law.

7. With respect to paragraph numbered 7 of the petition, denies that the Division judged the entire film on basis of a few isolated passages. The entire film was not banned and only those portions found to be immoral within the meaning of the statute are the subject of the action taken by the Division.

[fol. 26] 8. With respect to paragraph numbered 8 of the petition, denies that the Division exceeded the limits of its authority and alleges that it has noted in cognizance of and in conformance with the judgments of the Appellate Division in *Capitol Enterprises Inc.* vs. *the Regents* and so alleges:

(a) That views of a man and woman on a cot together in a state of undress, caressing each other subsequent to an illicit act of sexual intercourse;

(b) That views of a man caressing a woman's buttock, unfastening her clothing and caressing her erotically, accompanying this action with dialogue indicating that she is wearing no underclothing, and

(c) That views of a man and woman in bed together, apparently nude, subsequent to a night of illicit sexual love,

constitute such exceptional and flagrant cases as were within the contemplation of the court in its opinion (*supra*). Alleges further that the petitioner's allegations regarding the artistry, good taste and purpose of the subject film are irrelevant.

9. With respect to paragraph numbered 9 of this petition, denies that the Division acted arbitrarily, inconsistently and capriciously in demanding the elimination of the portions of the film listed in Exhibit A of this petition; denies that the previously licensed films cited represent exact cases in point and denies that standards were set by the previous [fol. 27] actions taken on these cited films which are now being violated to the detriment of the petitioner.

1. Denies the allegations set forth in paragraph numbered 10 of the petition.

WHEREFORE your respondent urges that the appeal herein be dismissed and that the action of the Motion Picture Division and the Acting Director of such Division be affirmed.

(Sgd.) HELEN H. KELLOGG.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HELEN H. KELLOGG, being duly sworn, deposes and says that she in the Acting Director of the Motion Picture Division of the State Education Department; that she is the respondent in the above entitled appeal; that she has

read the foregoing answer and knows the contents thereof and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters, she believes it to be true.

(sgd) HELEN H. KELLOGG

HELEN H. KELLOGG

Sworn to before me this
19th day of June, 1956.

TERESA G. ASKIN,
Notary Public, State of New York
No. 24-0105950
Certified in Kings Co.
Cert. filed in New York County
Commission Expires March 30, 1957

[fol. 28]

EXHIBIT C TO PETITION

OPINION AND ORDER OF THE BOARD OF REGENTS

[STATE SEAL] No. 6245

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER

of the

Appeal of Kingsley International Pictures Corporation from the determination of the Motion Picture Division of the State Education Department denying a license for the exhibit of the film

"LADY CHATTERLEY'S LOVER."

London, Simpson & London, Esqs.
Attorneys for Petitioner

This is an appeal to the Regents by the Kingsley International Pictures Corporation from the determination of

the Motion Picture Division of the State Education Department denying a license for the exhibition of the film "LADY CHATTERLEY'S LOVER."

In our opinion, the Motion Picture Division correctly held that the three sequences specifically referred to by said Division are immoral under the provisions of sections 122 and 122-a of the Education Law.

[fol. 29] Moreover, in our opinion, the whole theme of this motion picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior.

In its petition to us the petitioner states that this motion picture is "moral in its theme" and that the relationship of the principals, "although not sanctioned by law, is portrayed as a true marriage." Supporting the position thus taken by the petitioner, its attorney in his argument before us admitted that adultery is the theme but points to the Kinsey report as authority for the view that "the majority of moral people commit adultery."

We rest our determination upon the fundamental recognition by our society that adultery is condemned by both God-given law (Sixth Commandment given to Moses on Mount Sinai) and man-made law (sections 100-103 of the Penal Law).

In line after line and in sequence after sequence, this motion picture glorifies adultery and presents the same as desirable, as acceptable and as proper. We can not put our seal of approval upon such a motion picture, a seal which would permit its showing in the amusement theatres of the State, a seal which would accord immunity from criminal prosecution under section 1140-a of the Penal Law.

For these reasons, as well as for those stated by the Motion Picture Division, the action of the Motion Picture [fol. 30] Division is affirmed, this appeal is dismissed and the license is denied.

IN WITNESS WHEREOF, we, a duly constituted Committee of the Board of Regents, appointed pursuant to the provisions of Section 124 of the Education Law of the State of New York, do hereunto set our hands and affix the seal of the

University of the State of New York, at the City of Albany, this 28th day of September, 1956.

GEO. L. HUBBELL, JR.
JOHN F. BROSNAN
JACOB L. HOLTZMAN,
Committee of the Board of Regents

(SEAL)

AFFIDAVIT OF VICTOR WEYBRIGHT IN SUPPORT OF PETITION

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Victor Weybright, being duly sworn, deposes and says:

1. I am the Chairman of the Board of Directors of the New American Library of World Literature, Inc., (hereinafter referred to as "New American"), which has its principal offices at 501 Madison Avenue, New York City, N. Y.

[fol. 31] 2. New American is the publisher of an edition of D. H. Lawrence's novel "Lady Chatterley's Lover" (hereafter referred to as the "edition"). The edition was first published by New American in 1946 by arrangement with Alfred A. Knopf, Inc. I have initialed a copy of the edition for the purposes of identification, in the event its use is deemed necessary in the above entitled proceedings.

3. From September, 1946, to date, approximately 1,252,000 copies of the edition have been sold. One cannot state the exact number of copies of the edition that have sold in the State of New York. Based on New American's statistics, I think I can state with reasonable accuracy that more than 160,000 copies of the edition have been sold within the State of New York.

4. Since its publication in 1946, the edition has been sold and distributed throughout the State of New York without any interference or attempted interference by any government official or agency.

Victor Weybright

(Sworn to before Sherman P. Kimball, November 29, 1956.)

[fol. 32]

IN THE SUPREME COURT OF NEW YORK

STIPULATION AMENDING PETITION TO THE SUPREME COURT

It Is Hereby Stipulated and Agreed that the petition of Kingsley International Pictures Corporation to the Supreme Court in this proceeding, dated October 11, 1956, be and the same hereby is amended by the addition of the following subdivision (8) to Article 11 of the said petition:

"(8) The determination of the Regents that the film "Lady Chatterley's Lover" is immoral is contrary to the evidence, and the verdict of a jury to that effect rendered in an action in the Supreme Court of the State of New York triable by a jury would properly be set aside by the court as contrary to the weight of evidence."

Dated, New York, N. Y., November 20, 1956.

London, Simpson & London, Attorneys for Petitioner.

Jacob K [illegible]avits, Attorney General of the State of New York. Charles A. Brind, Jr., Counsel, Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 33]

IN THE SUPREME COURT OF NEW YORK

ANSWER OF THE BOARD OF REGENTS TO THE PETITION TO THE SUPREME COURT

The respondents by their attorneys herein answering the petition of the petitioner herein respectfully allege as follows:

First—Upon information and belief admit the allegations contained in paragraphs of the petition numbered "1", "2" and "3".

Second—Deny the allegations contained in paragraph of the petition numbered "4" except that respondents admit

that the film "Lady Chatterley's Lover" purports to be based on the novel of the same name by D. H. Lawrence and upon information and belief admit that an expurgated version of such novel is sold in the State of New York.

Third—Admit the allegations contained in paragraphs of the petition numbered "5", "6", "7" and "10" of the petition herein.

Fourth—Deny each and every allegation contained in paragraph of the petition numbered "11".

Fifth—Admit the allegations contained in paragraph of the petition numbered "8" except that as to petitioner's statement that the allegations of petition to the Board of Regents are realleged as though set forth in full therein, respondents deny all of such allegations as are inconsistent with the finding of the respondents as set forth in their determination.

[fol. 34] Sixth—Upon information and belief deny each and every allegation contained in paragraph numbered "9" of the petition except admit that fees are collected in conformity with the Education Law and the Rules of the Board of Regents, and except further that reference is made to the appropriations by the Legislature of the State of New York as shown in the annual budgets adopted by the Legislature for the substance thereof as indicating the amounts expended in administering the Motion Picture Licensing System, pursuant to the Education Law.

Further Answering the Petition and as a First, Separate and Complete Defense thereto, the Respondents Allege:

Seventh—That the respondents, the Board of Regents of the University of the State of New York, are vested, pursuant to Article V, Section 4, and Article XI, Section 2 of the Constitution of the State of New York and Part II of Article III of the Education Law, with the duty of licensing motion picture films and pursuant to such duty and authority said respondents are vested with the power, authority and jurisdiction to make the determination herein complained of.

Further Answering the Petition and as a Second, Separate and Complete Defense thereto, the Respondents Allege:

Eighth—That the hearings and proceedings in this matter were legally held pursuant to Section 206 of the Education Law.

[fol. 35] Further Answering the Petition and as a Third, Separate and Complete Defense thereto, the Respondents Allege:

Ninth—That even if the revenue collected for the licensure of motion picture films is a tax, such tax does not contravene the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of New York.

Tenth—Returned herewith and made a part hereof are the following exhibits:

Special Term Exhibit 1—Petition of Kingsley International Pictures Corporation to the Board of Regents.

Special Term Exhibit 2—Answer of Motion Picture Division.

Special Term Exhibit 3—Transcript of Argument before Committee of the Board of Regents.

Special Term Exhibit 4—Copy of opinion of Committee of the Board of Regents affirming determination of the Director of the Motion Picture Division.

Special Term Exhibit 5—Copy of the vote of the Board of Regents on September 28, 1956, affirming the determination of the Director of the Motion Picture Division.

Objections in Point of Law

1. The petition herein does not state facts sufficient to constitute a cause of action.

Wherefore the respondents pray for an order dismissing the petition herein on the merits together with costs and

[fol. 36] disbursements, and for such other and further relief as to this Court may seem just and proper.

Jacob K. Javits, Attorney General of the State of New York, Office & P. O. Address, State Capitol, Albany, New York. Charles A. Brind, Jr., Counsel to the Board of Regents of the University of the State of New York, Office & P. O. Address, State Education Building, Albany, New York, Attorneys for Respondents.

(Verified by James E. Allen, Jr., Commissioner of Education of the State of New York and the executive officer of the Board of Regents of the University of the State of New York, November 15, 1956.)

[fol. 38]

EXHIBIT 5 TO ANSWER

EXTRACT FROM JOURNAL OF REGENTS MEETING
September 28, 1956

LADY CHATTERLEY'S LOVER

After review of the motion picture film entitled "Lady Chatterley's Lover" and a full and careful discussion of the matter, upon the recommendation of the committee appointed for such purpose it was

Voted, That the determination of the Acting Director of the Motion Picture Division, denying a license for the exhibit of the motion picture film entitled "Lady Chatterley's Lover" on the ground the said film is "immoral" within the meaning of the provisions of Sections 122 and 122-a of the Education Law, is affirmed.

[fol. 39]

IN THE SUPREME COURT OF NEW YORK

STIPULATION AS TO FACTS—November 20, 1956

The parties hereto by their attorneys hereby stipulate that for the purposes of this proceeding only:

1. That the petitioner heretofore acquired the exhibition rights to the motion picture film "Lady Chatterley's Lover".

2. During the fiscal periods enumerated, the total sums collected (pursuant to Education Law, sec. 126) by the Motion Picture Division from applicants for licenses and permits to exhibit motion picture films were:

Period	Total Amount Collected
4/1/49 to 3/31/50	$376,614.50
4/1/50 to 3/31/51	388,940.00
4/1/51 to 3/31/52	458,323.50
4/1/52 to 3/31/53	418,481.00
4/1/53 to 3/31/54	398,979.50
4/1/54 to 3/31/55	421,126.25
4/1/55 to 3/31/56	433,559.00

3. During the fiscal periods enumerated, the following amounts were appropriated and expended directly in maintaining the Motion Picture Division:

	Appropriation	Expenditure
4/1/49 to 3/31/50	$ 92,960.00	$ 81,936.64
4/1/50 to 3/31/51	99,592.00	86,223.27
4/1/51 to 3/31/52	99,157.00	92,556.50
4/1/52 to 3/31/53	104,267.00	102,370.91
4/1/53 to 3/31/54	114,630.00	112,327.05
4/1/54 to 3/31/55	116,550.00	114,826.82
4/1/55 to 3/31/56	121,290.00	103,550.41

[fol. 40]

	Replacements		Additional	
	Appropriation	Expenditure	Appropriation	Expenditure
4/1/50	$2,070.00	$2,070.00	$ 40.00	$ 31.85
4/1/53	870.00	868.50	180.00	164.40

Equipment Replacement

	Appropriation	Expenditure
4/1/55 to 3/31/56	$22,825.00	$22,756.93

Alterations—Projection Room

	Appropriation	Expenditure
4/1/55 to 3/31/56	$17,800.00	$17,800.00
4/1/55 to 3/31/56	482.31	482.31

It is expressly agreed and stipulated that the aforesaid merely indicates the moneys directly appropriated to the Motion Picture Division of the State Department of Education and expended directly in maintaining said Division, and do not include and are not purported to include in any sense other moneys, the amounts of which have not been ascertained or estimated, expended by the State of New York through other bureaus, divisions, officers and employees of the State Department of Education and through other employees, officers, departments, instrumentalities and divisions of government of the State in connection with the exhibition of motion pictures in the State.

It is further agreed that this stipulation is made without prejudice to the rights of either party in any other action [fol. 41] or proceeding, and may not be used in any other action or proceeding.

Dated, Albany, New York, November 20, 1956.

London, Simpson & London, Attorneys for Petitioner Kingsley International Pictures Corporation.

Jacob J. Javits, Attorney General of the State of New York. Charles A. Brind, Jr., Counsel, Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 42]

IN THE SUPREME COURT OF NEW YORK

STIPULATION WITH RESPECT TO EXHIBITS—December 10, 1956

It is hereby stipulated and agreed that the motion picture film "Lady Chatterley's Lover" and the three photographs offered in evidence upon the argument before the Regents shall be deemed a part of the record on appeal in this appeal, and the aforesaid film, or any part or parts thereof, shall, if request is made by the Court, be exhibited on the argument of this appeal, and the aforesaid photographs may be physically submitted to the Court by either party upon the argument of this appeal.

It is further stipulated and agreed that the transcript of the argument of counsel before the Committee of the

Board of Regents (Exhibit 3 attached to Respondents' Answer) be omitted from the printed Record of Proceedings in this matter.

Dated, December 10, 1956.

London, Simpson & London, Attorneys for Petitioner-Appellant.

Jacob K. Javits, Attorney General of the State of New York; Charles A. Brind, Jr., Counsel Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 47]

At a Term of the Appellate Division of the State of New York, held in and for the Third Judicial Department, in the City of Albany, N. Y., commencing on the 21st day of January, 1957.

Present:

Hon. Sydney F. Foster, Presiding Justice.

Hon. Francis Bergan, Hon. William H. Coon, Hon. Philip Halpern, Hon. James Gibson, Associate Justices.

In the Matter

of

The Application of Kingsley International Pictures Corporation, Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Act,

against

The Regents of the University of the State of New York, Respondents.

Appellate Division Order Appealed From

An application having been made by Kingsley International Pictures Corporation, the petitioner in this proceed-

ing, to review the determination of the respondents, the Regents of the University of the State of New York, sus-[fol. 48] taining the refusal of the Motion Picture Division of the State Department of Education to license the motion picture "Lady Chatterley's Lover," and said application having regularly come on to be heard at a Special Term of the Supreme Court held in and for the County of Albany, before the Hon. Isidore Bookstein, and that Court, by an order dated November 21, 1956, having transferred this proceeding to the Appellate Division of the Supreme Court, Third Judicial Department, for disposition pursuant to section 1296 of the Civil Practice Act; and said proceeding having been duly brought to argument at the above term;

Now, on reading and filing the notice of proceeding dated October 11, 1956, the petition duly verified October 11, 1956, and the exhibits annexed thereto, the answer of the respondents duly verified November 15, 1956, with the exhibits annexed thereto, and upon all the other papers and proceedings heretofore had herein; and after hearing Ephraim S. London, of counsel for the petitioner, in support of the said application, and Dr. Charles A. Brind, Jr., attorney for the respondents, in opposition thereto; due deliberation having been had and a decision thereon having been handed down on July 24, 1957, it is

Ordered that the determination of the Regents of the University of the State of New York sustaining the decision of the Motion Picture Division of the State Department of Education refusing the petitioner, Kingsley International Pictures Corporation, a license for the exhibi-[fol. 49] tion of the motion picture film "Lady Chatterley's Lover" be and the same hereby is in all respects annulled, and it is further

Ordered that this matter be and the same hereby is remitted to the License Division of the Motion Picture Division of the State Department of Education, and that the said License Division, upon service upon it of a copy of this order, is forthwith directed to issue to the petitioner, Kingsley International Pictures Corporation, a license for the exhibition of the motion picture film "Lady Chatterley's Lover," and the Regents of the University of the State of

New York, the respondents herein, are directed to pay to the petitioner the sum of $50.00 as costs and the disbursements of this proceeding.

Opinion by Coon, J., is referred to herewith.
Bergan, Halpern & Gibson, JJ., concur.
Foster, P. J., concurs in the result.

A true copy

Ent: 8-1-57.

J. Robert Lannan, Clerk.

[fol. 50]

In Supreme Court

Appellate Division—Third Judicial Department

Decision handed down July 24, 1957

In the Matter

of

The Claim of Kingsley International Pictures Corporation, Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act,

v.

The Regents of the University of the State of New York, Respondents.

Decision—July 24, 1957

Determination annulled, with fifty dollars costs, and the matter remitted to the license division with a direction to license the film.

Opinion by Coon, J.
Bergan, Halpern and Gibson, JJ., concur.
Foster, P. J., concurs in the result.

[fol. 51]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

OPINION OF APPELLATE DIVISION

Argued January Term, 1957

Before:

Hon. Sydney F. Foster, Presiding Justice,

Hon. Francis Bergan, Hon. William H. Coon, Hon. Philip Halpern, Hon. James Gibson, Associate Justices.

Proceeding under Article 78 of the Civil Practice Act (transferred to this court by order of the Supreme Court at Special Term in Albany County), to review a determination of the Regents of the University of the State of New York, refusing to issue a license to petitioner for the general exhibition of a motion picture film.

London, Simpson & London, (Ephriam S. London, of Counsel), Attorneys for Petitioner, 150 Broadway, New York City.

Charles A. Brind, Jr., Attorney for Respondents, State Education Building, Albany, New York.

Charles J. Tobin, Jr., Attorney for New York State Catholic Welfare Committee, *amicus curiae*, 100 State Street, Albany, New York.

Charles Ballon, 1501 Broadway, New York City, Nanette Dembitz, 150 Fifth Avenue, New York 10, N. Y., and Jacob M. Usadi, 1501 Broadway, New York City, Attorneys for New York Civil Liberties Union, *amicus curiae*.

[fol. 52] COON, J.:

The motion picture under review is "Lady Chatterley's Lover", an adaptation of the novel of the same name by D. H. Lawrence. The Motion Picture Division of the State Education Department denied a license unless three sequences which were regarded as "immoral" were deleted. On appeal by petitioner the Regents not only upheld the original licensing authorities, but determined that the en-

tire picture was immoral under section 122 of the Education Law as modified by section 122-a (L. 1954, Ch. 620), largely upon the ground that the picture presents "adultery as a desirable, acceptable and proper pattern of behavior." This criterion comes from the language of section 122-a, obviously adopted in an attempt to add definiteness and clarity to the words used in section 122, and with the intended purpose of overcoming the United States Supreme Court decisions which held, in effect, that the terms "immoral" and "tend to corrupt morals," as used in section 122, were too vague to meet constitutional requirements. (*Burstyn v. Wilson*, 343 U. S. 495; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587.).

The Legislature, in enacting section 122-a, has demonstrated a legislative intent to continue prior restraint in New York State, and has attempted to supply the necessary definiteness to the terms "immoral" and "of such a character that its exhibition would tend to corrupt morals."

Section 122-a illustrates the difficulty of defining such words. Subdivision 1 thereof provides: "For the purpose of [fol. 53] section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

Ordinarily such a word as "immoral", which might have one meaning to one person or group of persons and another meaning to another person or group of persons, cannot be defined with such exactness or precision as would leave no field of individual opinion and discretion open to the viewer. Adding more adjectives or more words which are likewise open to different opinion helps little. In fact, counsel for respondents stated in his brief before the Supreme Court in the *Commercial Pictures* case: "The New York statute, we think, is as clear as it can possibly be made * * *." (Referring to section 122 before the amendment.)

For instance, under section 122-a, the censoring body must determine what "the dominant purpose or effect" of

a picture is, a matter upon which different people or groups of people might disagree. The same is true as to what constitutes "acts of sexual immorality, perversion, or lewdness."

[fol. 54] As we interpret the decisions of the Supreme Court of the United States in the *Burstyn* case, the *Commercial Pictures* case, and Holmby Productions v. Vaughn (350 U. S. 870), a statute which leaves any filed (sic) open to the opinion, discretion or individual point of view of a censor in banning a moving picture violates the Fourteenth Amendment. If any filed (sic) of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration.

Under the decisions it is clear that the standards set up in section 122-a relied upon by the Board of Regents in this case, namely, the presentation of adultery or similar "immoral" acts "as desirable, acceptable or proper patterns of behavior," is not a permissible standard under the United States Constitution for prior restraint.

The most recent decision on this subject by the Court of Appeals of New York State is *Matter of Excelsior Pictures Corp.* v. *Regents*, (3 N. Y. 2d ....., decided July 3, 1957). While the Court of Appeals did not strike down the censorship entirely, the court interpreted the United States Supreme Court decisions as limiting cencorship (sic) to a picture which is "obscene" as that term is narrowly defined in modern judicial decisions. As Judge Desmond stated in his opinion in that case: "Since the Constitution forbids any prior restraint of a motion picture which is not obscene * * *" and, "Since the film is certainly not 'obscene' in the eyes of the law, it cannot, under United [fol. 55] States Supreme Court decisions hereinafter listed and binding upon us, constitutionally be subjected to prior restraint." The opinions in the *Excelsior Pictures* case so thoroughly and completely analyze all of the authorities which are pertinent here it seems unnecessary to discuss them further. We have viewed the picture under consideration here and do not think it can be considered obscene as that term is now judicially defined. Hence, the license denial was unconstitutional.

The determination should be annulled, with fifty dollars costs, and the matter remitted to the license division with a direction to license the film.

[fol. 56]

IN THE COURT OF APPEALS OF NEW YORK

In the Matter of KINGSLEY INTERNATIONAL PICTURES CORPORATION, Respondent,

against

REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Appellant.

OPINION—Decided May 15, 1958.

Chief Judge Conway. This case presents us again with the question of the constitutionality of our motion picture licensing law. Undoubtedly this is often a question of the greatest delicacy. But as we ponder this particular case and what is involved here, we perceive no necessity for apprehension as to the justice or constitutionality of the Board of Regents' determination to deny a license to this film, "Lady Chatterley's Lover". This denial was based upon sections 122 and 122-a of the Education Law which *require* the denial of a license to motion pictures which are immoral in that they *portray* "acts of sexual immorality * * * as desirable, acceptable or proper patterns of behavior." *It is this portion of the statute only which concerns us here.* The vileness of the matter it seeks to reject is clear. It embraces not only films which are visually suggestive and obscene, nor only those which are sexually suggestive and immoral in theme, but those which combine the two. The statutory rejection is aimed at those films which, not being satisfied with portraying scenes of rank obscenity, go further and recommend sexually immoral acts, thus portrayed in a manner appealing to the prurient interest, as proper conduct for the people of our State.

Having clarified the substance of what this case involves, we proceed to a consideration of the several issues raised.

And we approach them with confidence in our Legislature, concern for our people, and a firm conviction of our solemn constitutional duty which requires us not only to protect the individual from oppressions of government, but the government and the people from abuses by the individual. [fol. 57] This film deals with the relationships of Lady Chatterley with her husband, Sir Clifford Chatterley, and her lover, Mellors. Sir Clifford returned to his wife from the wars as a cripple doomed to a life in a wheelchair. His war injury rendered him impotent to father offspring. By the standards of the community in which he lived, he was a man of affluence, owning a mine and extensive lands. His status was comparable to that of a feudal lord, and much like a feudal lord he was gravely concerned over the fact that he neither had, nor would have, an heir. This led him to propose to his wife, Lady Chatterley, that she have sexual relations with another man of her own choosing so that she might bear an heir for Sir Clifford. Lady Chatterley appeared to reject this idea, inquiring of her husband whether he still loved her, and whether it would be wise to do such a thing since the possibility existed that she might fall in love with the man to whom she would give her body. Sir Clifford explained that his desire for her to have a child was the highest possible expression of his love, and he pointed out that another love could not be born of the purely physical relationship which he anticipated she would have with such a man. No more was said, and Lady Chatterley left her husband's bedroom in which they had been talking.

Subsequently, Lady Chatterley's sister suggested that she take a vacation from the arduous task of caring for her crippled husband. The city of Venice was suggested, and Sir Clifford heartily indorsed this idea, thinking that such a trip would provide his wife with the ideal circumstances for choosing a lover and committing adultery with him.

Before going to Venice, Lady Chatterley made the acquaintance of Mellors, Sir Clifford's gamekeeper. Mellors was a married man, but was living apart from his wife. It was not long before Lady Chatterley and Mellors indulged in adultery. Scenes of their passion were portrayed. Their *affaire*, climaxed by the pregnancy of Lady Chatterley, was unfolded through a series of clandestine bedroom

scenes during which the two were shown lying in bed in a state of apparent undress before, and again after, acts of adultery; during which Mellors assisted Lady Chatterley in her preparations for the sexual act by unbuttoning her blouse and unzipping her dress; during which Mellors expressed his passion by caressing her buttocks, after reaching with his hand under her dress, noting that she had obligingly come to him clad only in a dress, without undergarments; during which numerous other words, gestures and motions were employed to provide the atmosphere prefatory and subsequent to acts of adultery; and during which, at Lady Chatterley's instigation, Mellors removed from the wall above the mantle piece in his living room a large framed picture of his wife and destroyed both frame and picture. [fol. 58] The scenes were set, interrupted only by brief canvasses of darkness, upon which the imagination was permitted to complete the picture of illicit sexual love. Out of these intimacies was born a "love" between Lady Chatterley and her lover Mellors which each regarded as binding them in a true marriage, although not a marriage solemnized by church or state, and although their respective sponses were living.

Events followed quickly on the heels of Lady Chatterley's pregnancy—her trip to Venice, Mellors' dimissal by Sir Clifford because of scandalous "rumors" regarding the two, and her return to the manor. When she returned, Mellors was packing his things in preparation for his departure from the estate. She went first to Mellors to profess her love and to tell him that she would forsake her husband, her wealth and her position to live with him. She then went to her husband to admit the truth of the "rumor" and to tell him of her decision to live with Mellors. Sir Clifford refused to agree to a divorce and insisted that he be given the child when it should be born. Lady Chatterley rejected that and returned to Mellors. The curtain falls as Lady Chatterley and her lover leave his abode for what apparently was regarded by their neighbors who witnessed it from their porches and doorways as a life of illicit intimacy. We make brief mention also of another scene in which Mellors' wife apparently indulges in an act of intercourse with another man beside a body of water.

The dominant theme of the film may be summed up in a few words—exaltation of illicit sexual love in derogation of the restraints of marriage. Their relationship was presented as a true marriage. Their complete surrender to the baser instincts was presented as a triumph over the social mores. Their decision to live in adultery was quietly heralded as a conquest of love over the "form" of marriage. And this entire theme was woven about scenes which unmistakably suggested and showed acts of sexual immorality.

That such is the theme of this motion picture is not open to doubt, particularly in light of respondent's own statement in its brief that the principal theme is that a true marriage exists where there is love, "not when there is merely a formal relationship sanctioned by law." And indeed, in its petition to the Board of Regents, respondent stated that "[h]er [Lady Chatterley's] relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage." Thus, this film unquestionably presents adultery as a proper pattern of behavior. And it does so employing several scenes of obscenity.

However, respondent suggests that the film is nevertheless not immoral according to the mores and moral standards of the community. We think it is beyond cavil that the moral standards and mores of the people of the State [fol. 59] of New York (indeed, of our nation) brand adultery as immoral and illegal. The relationship between Lady Chatterley and Mellors was precisely that—adultery. To urge that such conduct is not immoral constitutes a confession of values so condemnable as not to warrant further comment. The determination by the Board of Regents, a constitutional body, that this picture is utterly immoral in its theme, and that it presented adultery as proper behavior, was entirely correct as measured by the standards of our community. But beyond that, the Legislature specifically designated such a motion picture as immoral, and the determination by the Regents was mandated by statute. Indeed, adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai. Any suggestion that this film merely demonstrates the necessity for love in marriage insults a concept of the profoundest nobility, and fails to recognize the clear and familiar distinction between

licit and illicit love. To urge that this motion picture merely points up the necessity for love in marriage ignores the facts and the story—the whole context.

It is next urged that this statute is unconstitutionally vague and indefinite. The United States Supreme Court has established the necessary principle that motion picture licensing may be conducted only pursuant to a statute which is so clear in its terms that the licensor is furnished with a definite standard which he may apply (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 504-505; see, also, *Superior Films* v. *Department of Educ. of Ohio* and *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587). The purpose underlying this principle is to divest the licensor of unlimited restraining power based upon his own judgment of what shall or shall not be licensed—to avoid what may be denominated as discretionary censorship. The standard under consideration here is as explicit and restrictive in its terms as words permit. Our Legislature through section 122-a *requires* the denial of a license to any motion picture which *portrays* acts of sexual immorality (here adultery) as proper behavior. No one will deny that the Regents of New York State, just as the members of this court, know what an act of sexual immorality is, and that adultery is such an act. This standard leaves no area of judgment or speculation open to the Regents in which they might arrive at personal judgments as to what constitutes immorality. Their sole function under the statute is the fact-finding function as to whether a particular motion picture portrays acts of sexual immorality as proper behavior. If it does, it is *ipso facto* immoral by statutory mandate. To hold that this standard is vague or indefinite would be to hold that the requirement of definiteness expounded in the *Burstyn* case is impossible to satisfy.

[fol. 60] It should be noted that section 122-a was enacted by our Legislature in 1954 in an attempt to comply with the decision without opinion of the United States Supreme Court in the *Commercial Pictures* case (*supra*). When that case was decided, there was no statutory definition whatever of the word "immoral." We held, in rather general terms, as distinguished from the customary specificity of statutes, that the word "immoral" related to "standards of

sexual morality" (*Matter of Commercial Pictures Corp. v. Board of Regents*, 305 N. Y. 336, 346). On appeal to the United States Supreme Court, our decision was reversed without opinion on the authority of the *Burstyn* case (*supra*) which held only, by express limitation in that opinion, that the word "sacrilegious" is too vague and indefinite. The portion of section 122-a which we are considering here, for the first time, defines the word "immoral" much more explicitly than this court construed it in *Commercial Pictures*. Thus, while we reach our conclusion that this standard is definite independently of *Commercial Pictures*, it may be pointed out that our decision there also leads to this result. Futhermore, the reversal without opinion by the Supreme Court in that case cannot be deemed to be dispositive of the new, different, and more explicit language employed in section 122-a *as it applies here*.

Respondent next argues that expression of *opinion* may not be suppressed in the absence of a showing of clear and present danger of substantive evil to the community. It should first be emphasized that the scope of section 122-a is not mere expression of opinion in the form, for example, of a filmed lecture whose subject matter is the espousal of adultery. We reiterate that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature. The question, then, is whether such a motion picture must be *shown* to present a clear and present danger of substantive evil to the community.

Respondent's argument fails to recognize the evil and danger to society which *inheres* in expressions which debase fundamental sexual morality by portraying its converse to the people as alluring and desirable. Such expression has been universally and traditionally condemned by our national society—its inherent evil dependent not at all on the times. It is the very nature and function of such expression to corrupt the public morals. The United States Supreme Court has said that the prevention and punishment of such expression has "never been thought to raise any Constitutional problem", and that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

derived from them is *clearly outweighed by the social interest in order and morality.*" (*Chaplinsky* v. *New Hamp-*
[fol. 61] *shire*, 315 U. S. 568, 571-572; see, also, *Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257; emphasis added.) Thus, in *Roth* v. *United States* (354 U. S. 476), it was held that "obscenity is not protected speech" and that, therefore, there is no need to consider whether "obscene material will perceptibly create a clear and present danger of anti-social conduct" (p. 486). It was noted that obscenity has always been rejected as utterly without redeeming social importance (p. 484). But obscenity is only one word which, among others, signifies "that form of immorality which has relation to sexual impurity" (*Swearingen* v. *United States*, 161 U. S. 446, 451). All these words—indecent, immoral, obscene, lewd, lascivious, etc.—refer to the same substantive evil, viz., sexual impurity and immorality. (See *Swearingen* v. *United States*, *supra*; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 243; *People* v. *Winters*, 294 N. Y. 545, 550, revd. on other grounds, 333 U. S. 507; *People* v. *Muller*, 96 N. Y. 408.) Their definitions in legal dictionaries reveal they are used interchangeably. They have the same meaning as in common-law prosecutions for obscene libel (*Swearingen* v. *United States*, *supra*, p. 451; *Matter of Dampier*, 46 Idaho 195; *State* v. *Scope*, 46 Del. 519), which embraced any writings, pictures or the like "of an immoral or an illegal tendency" (4 Blackstone's Comm., p. 150), and "such indecent or immoral publications as tend to destroy the love of purity, morality and virtue, and corrupt the public morals." (Chase, Blackstone's Comm., p. 916, n. 3; see *Rex* v. *Curl*, 2 Str. 788, 93 Eng. Rep. 849). At common law every public show and exhibition which was contrary to good morals was indictable (1 Bishop on Criminal Law, § 504). And so, "freedom of speech * * * does not permit the publication of * * * indecent articles, or other publications injurious to public morals * * *." (*Robertson* v. *Baldwin*, 165 U. S. 275, 281.)

Our conclusion, therefore, is the same as that of the United States Supreme Court in the *Roth* case (*supra*). It is unnecessary to consider whether a motion picture which alluringly portrays sexually immoral acts as proper behavior does, in fact, present a clear and present danger

of substantive evil to the community, if indeed such could reasonably be doubted. There is no difference in substance between motion pictures which are corruptive of the public morals, and sexually suggestive, because of a prodominance of suggestive scenes, and those which achieve precisely the same effect by presenting only several such scenes in a clearly approbatory manner throughout the course of the film. *The law is concerned with effect, not merely with but one means of producing it. We do not believe that a film which is rank pornography is objectionable simply because it excites a human appetite. Rather, the objection lies in* [fol. 62] *the corrosive effect upon the public sense of sexual morality.* The principle which has always prompted the rejection of obscenity is the "social interest in order and morality." (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572, *supra; Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257, *supra*).

Essentially, then, the question amounts to this: What can society do about protecting itself from motion pictures which are corruptive of the public morals? We hold that it may refuse to license a motion picture which alluringly portrays adultery as proper behavior. We so hold with full confidence that our Founding Fathers never intended that our Federal Constitution be the altar upon which this State, and this nation, must sacrifice themselves to the ravages of moral corruption. Our Constitution is a document for government, not a tool for anarchy or a license for corruption.

Our holding that a license may constitutionally be denied under the circumstances presented here is well supported in principle by our prior decisions (see *Matter of Excelsior Pictures Corp.* v. *Regents, supra; Matter of Commercial Pictures Corp.* v. *Board of Regents, supra*). We noted in *Excelsior* that sexual immorality is the only legal basis for censorship, keeping in mind that the licensing statute must be very clear. While we noted in *Excelsior* (*supra*, p. 240) that "[w]e will not * * * quibble or quarrel as to concepts of decorum or delicacy or manners", it would seem unnecessary to stress that adultery is not a mere matter of etiquette. Moreover, we view the several decisions of the Supreme Court as indicating the validity of motion

picture licensing directed against sexual immorality *provided* the licensing statute clearly delineates the standard which the licensors are to apply. (See *Commercial Pictures Corp.* v. *Board of Regents, supra; Superior Films* v. *Department of Educ. of Ohio, supra; Joseph Burstyn, Inc.*, v. *Wilson, supra.*) We would be content to rest our decision upon this precedent were it not that the dearth of authoritative opinions leaves the law of motion picture licensing in a state of some uncertainty. Hence, we proceed to further discussion.

Strictly from a pragmatic standpoint, public morality is essential to a civilized society. "History bears witness to the fate of peoples who have been indifferent to the vice of indiscriminate sexual immorality—a most serious threat to the family, the home and the State." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 342, *supra.*) "The destruction of morality renders the power of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together." (*Commonwealth* v. *Sharpless*, 2 Serg. & Rawl. 91, 103 [Pa., 1815].) Thus, it has always been true that the preservation of public morality is a proper subject for the exercise of the police power. And the Constitutional right [fol. 63] freely to express one's thoughts has never been thought to divest society of its right and duty to preserve fundamental public sexual morality. (*Chaplinsky* v. *New Hampshire, supra*, pp. 571-572.) Thus, sexually impure utterances tending to corrupt the public morals have always been criminally punishable. Very recently, the United States Supreme Court sustained the injunctive process as a perfectly constitutional remedy whereby a State may protect its people from the evil effects of obscene books. *Kingsley Books* v. *Brown*, 354 U. S. 436.) The *Kingsley* case has put to rest the claim that no prior restraint is constitutionally permissible. That court said: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." (P. 441.) Stress was laid on the fact that upon the courts falls the duty of close analysis and a pragmatic assessment of the operation of the statute under particular circumstances. We apply these thoughts also to the remedy of motion picture licensing.

We do not regard the word "censorship" as a self-wielding sword and we reject it as a talismanic test. Whatever may be the constitutional inhibition against the licensing of books, which were a communicative medium familiar to our forefathers, we cannot conclude that motion pictures must be regulated in precisely the same fashion. It has been observed that "[t]he various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. * * * Movies have created problems not presented by the circulation of books, pamphlets, or newspapers * * * ." (*Kovacs* v. *Cooper*, 336 U. S. 77, 96.) And thus, the Supreme Court declared six years ago, when it first held motion pictures to be within the general protection of the First and Fourteenth Amendments, that:

"To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * *Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.*" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, pp. 502-503; emphasis added.)

A contention that motion pictures must be subject to only the same type of regulation as books is "sterile argumentation [which] treats society as though it consisted of bloodless categories" (*Kovacs* v. *Cooper, supra*, p. 96). The greater capacity for evil which inheres in motion pictures has been recognized by the highest Federal tribunal as [fol. 64] "relevant in determining the permissible scope of community control" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, p. 502). We heed the warning of Justice Holmes that "'[t]o rest upon a formula is a slumber that, prolonged, means death'", and we obey the admonition of Justice Frankfurter, as he pondered this thought, against "mechanical jurisprudence through the use of oversimplified formulas." (*Kovacs* v. *Cooper, supra*, p. 96.) "The tyranny of labels * * * must not lead us to leap to a conclusion that

a word which in one set of facts may stand for oppression or enormity is of like effect in every other." (*Palko* v. *Connecticut*, 302 U. S. 319, 323.) To deny the remedy of licensing as against motion pictures under circumstances such as those disclosed here would be to ignore the spirit and purpose of our Federal Constitution which has always been deemed to permit society to employ remedies which are adequate to protect itself from corruption of public sexual morality. Law, *particularly* constitutional law, is the means whereby society is preserved and held intact. Catch phrases such as "no movie licensing" do nothing to subserve that end. We are molding constitutional *justice*, and have no interest in perpetuating as a motto a concept which was valid *as intended and as applied*, in past history, but not as some seek to extend it today in total disregard of the progress of civilization and the consequences of change, both good and evil. The constitutionality of this statute must be assessed pragmatically in terms of its necessity to society in exercising its vital and recognized right to preserve the public morality.

In considering the question of motion picture licensing, this court has pointed out that "[n]o other method will afford reasonably adequate protection to the public." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, *supra*, pp. 343, 351.) We are not concerned here with licensing books, pamphlets, newspapers, etc., the traditional media of expression. Moving pictures are our only concern and, what is more to the point, only those motion pictures which alluringly present acts of sexual immorality as proper behavior. This is not a case of a book on a shelf or in a home—it is a case of *mass* dissemination of approved illicit sex by the spoken word and a visual art. It is a case not of one showing but hundreds of showings. It is a case not of an audience of one, but audiences of hundreds—in some cases thousands—at *each* showing. It is a case not merely of a theme of words, but a theme woven about scenes clearly portraying and suggesting acts of adultery. Bearing in mind the broad scope of motion picture presentation, how may society effectively discharge its responsibility to protect itself from morally corruptive films. After all, we are dealing only with a question of remedy—there is no ques-

tion as to the evil which is the subject of the remedy. Not [fol. 65] even the injunctive process, already recognized as constitutionally permissible against obscene *books*, is adequate unless the theory is to be that the public morality may be corrupted from the first showing of the film until it is detected and finally enjoined. We can take little consolation from whatever brevity there may be in such a period of time, notwithstanding the possibility of injunctions *pendente lite*, when one considers the saturation techniques employed by the motion picture industry which presents numerous showings at one and the same time, with several showings per day in each theatre. And beyond that, we take note of the possible multiplication of this mass presentation by means of television. There can be little doubt that the only *effective* remedy which society possesses lies in a system of motion picture licensing which will operate adversely only to motion pictures which are corruptive of public morality. The substantive evil of the expression considered in light of the medium in issue make this a necessary and constitutional policy. To hold otherwise would be a "decision of desperation" (*Poulos* v. *New Hampshire*, 345 U. S. 395, 408)—a confession that our State is helpless to prevent the corruption of public morals, a duty which it has assumed from time immemorial. We do not believe this is a confession which this court is required to make.

Analyzing this statute still further, we note that full judicial review under article 78 of the Civil Practice Act is available as a matter of right from any and every adverse determination by the Board of Regents (Education Law, § 124). Fully appreciative of the preferred position of the constitutional guarantee of free expression, the courts of this State will always be alert to excesses and most quick to correct them, as indeed we were recently in the *Excelsior* case (*supra*). We note further that " * * * this sovereign State put the licensing power in one of its most powerful and most respected governmental bodies, the Board of Regents, a 'citizens' board' which is at the head of the State's educational system. Censorship in New York is, therefore, carried on at the highest levels of responsible State Government." (*Matter of Commercial Pictures Corp.*

v. *Board of Regents*, 305 N. Y. 336, 350, *supra*) Thus safeguarded, the operation of this statute is simply to protect the citizens of our State from motion pictures which alluringly portray acts of sexual immorality (here adultery) and recommend them as a proper way of life. No other remedy will accomplish this result. Considering all of the foregoing, our judgment is that this statute insofar as it is involved here survives the test of close analysis and pragmatic assessment laid down by the highest Federal tribunal in the *Kingsley* case (*supra*).

[fol. 66] It is fundamental that each sovereign State has, under the Federal Constitution, the primary responsibility for the preservation of the basic morality of its people. Of course, it is equally fundamental that the State must discharge that responsibility without undue infringement upon individual liberty. But the distinction between liberty and license must be made. We fail to perceive what right is infringed here. The Constitution of the United States, "that great ordinance of government and *orderly liberty*"; is invoked to protect the mass dissemination of approved sexual immorality by adultery in motion pictures from the only effective remedy which society possesses. (See *Schaefer v. United States*, 251 U. S. 466, 477; italics supplied.) In the name of liberty we are requested to confer license to corrupt. "It would be a travesty on the constitutional privilege he invokes to assign him its protection." (*Gilbert v. Minnesota*, 254 U. S. 325, 333.)

Only the State, close to the problems of its people, can fully appreciate them. We are disturbed by the increasing marks of moral laxity. Sex crimes occur daily. Advertising appeals more and more to the sexual appetite. Sexual immorality and obscenity appear in books, pamphlets, voice recordings, motion pictures, photographs, prints, and in every other form which the imagination of those bent upon immorality and filth can devise. Sadly enough, we could go on. But this much is sufficient to demonstrate that our public morality, possibly more than ever before, needs every protection which government can give. We are unable to look upon moral disintegration as a mere change in custom. We reiterate that "[t]he destruction of morality renders the power of the government invalid, for govern-

ment is no more than public order * * * ." (*Commonwealth v. Sharpless, supra*, p. 103.)

There would seem to be little difficulty for most to accept sheer obscenity as a proper basis for motion picture censorship. However, to lay hold of obscenity as the *only* proper basis for motion picture censorship is to ignore substance in favor of form. As we noted earlier in discussing the question of clear and present danger, obscenity has been universally and traditionally rejected *because it is destructive of the public morality*. In view of this, it is curious indeed to say in one breath, as some do, that obscene motion pictures may be censored, and then in another breath that motion pictures which alluringly portray adultery as proper and desirable may not be censored. As stated above, "The law is concerned with effect, not merely with but one means of producing it." It must be firmly borne in mind that to give obscenity, as defined, the stature of the only constitutional limitation is to extend an invitation to corrupt the public morals by methods of presentation which craft will insure do not fall squarely within the definition of that [fol. 67] term. Precedent, just as sound principle, will not support a statement that motion pictures must be "out and out" obscene before they may be censored. *Roth v. United States* (354 U. S. 476, *supra*) did not involve motion pictures, much less their licensing. It merely held that obscenity is not protected speech and in the case of an obscene book it is not necessary to establish clear and present danger of substantive evil to the community. In sum, the Supreme Court has never outlined the substantive limits of motion picture censorship. To claim otherwise is to supplant reality with hope, and replace law with theory.

We refuse to be led away by alarmist cries that, if a license is refused under the circumstances disclosed by this record, the door is opened to unnecessary and unwarranted extensions of that remedy. The very test of necessity which we have utilized precludes that possibility. And we have already declared it to be our most solemn constitutional duty to " 'eschew the extremes and shun the extremists' ". (*Matter of Excelsior Pictures Corp. v. Regents, supra*, p. 246.) There is nothing extreme about refusing a license to films which alluringly portray acts of sexual immorality

by adultery as proper behavior. To withhold our approval from this amount of regulation would itself be an extreme. To those who fear possible unnecessary extensions of this remedy, we reply that this court is competent to define the permissible scope of motion picture licensing and to safeguard constitutional liberties.

It is not aside from the issue to ponder, for a moment, the fact that this State and this nation have always been dedicated to the observance of fundamental morality. Indeed, when we declared our independence from the yoke of tyranny, we conceived that the unalienable liberties of men, one of which is free expression, are endowed "by their Creator". And in the same document, as they embarked upon the cause of freedom, its drawers expressed "a firm reliance on the protection of Divine Providence". After the cause was won, the Congress observed that "morality" is "necessary to good government". (Ordinance of 1787, art. III; McKinney's Cons. Laws of N. Y., Book 2, Constitution, pt. 2, p. 527.) Lest anyone claim that almost two centuries have worked a contrary view in this nation, let him reflect upon the recent words of the United States Supreme Court: "We are a religious people whose institutions presuppose a Supreme Being." (*Zorach* v. *Clauson*, 343 U. S. 306, 313.) And let him consider also the fact that the Pledge of Allegiance was recently altered so that it declares this nation to be one "under God." We can think of no greater national hypocrisy, or perversion of our Constitution, than to say that that document renders society impotent to adopt the only adequate remedy against motion pictures which are corruptive of the public morality. Indeed, [fol. 68] it is necessary for our survival as a nation in an age of open conflict with atheistic materialism.

This case presents not only a question of law. It presents a matter of governmental conscience for which we are all responsible. We perceive no requirement in our Constitution that prohibits us from concluding as we have. If our people must be exposed to mass sexual immorality, if the very fabric of our society is to be laid bare to such corrosive influences, it must be at the command of our people themselves. Their command, however, has been to the contrary by virtue of this enactment. We think their decision is supported by their Constitution.

No other issues are raised which require discussion.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

DESMOND, J. (concurring). Appellants, the State Board of Regents, have banned the motion picture "Lady Chatterley's Lover" as being "immoral" within the special definition of that word in subdivision 1 of section 122-a of the Education Law, that is, as being a film "which portrays acts of sexual immorality * * * or lewdness" and which "presents such acts as desirable, acceptable or proper patterns of behavior". Since the theme and content of this film fairly deserve that characterization, the Regents acted within their express statutory powers in refusing to license it for exhibition. That, however, does not decide this lawsuit.

The question for decision is the one that has troubled our court and other State courts as well as the United States Supreme Court in a long series of litigations (from *Mutual Film Co.* v. *Ohio Ind. Comm.*, 236 U. S. 230 [1915], to *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 [1957]) involving State or municipal censorship of movies. Our problem is whether this statute insofar as it imposes prior restraint on the showing of this film in New York State offends against the free speech guarantee of the First and Fourteenth Amendments to the United States Constitution. In arriving at our answer we must perform a double duty. We must abide by the decisions of the supreme Federal judicial tribunal so far as pertinent and at the same time we must be reluctant to strike down a solemn legislative enactment on the ground of unconstitutionality, for that we may do "only as a last resort" (*Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555). I am voting to reverse here and to uphold this denial of a license because this New York statutory definition of "immoral" carefully and quite recently devised by chapter 620 of the Laws of 1954 to meet constitutional objections (see *Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587) to the use of such wide or vague terms as [fol. 69] "immoral" and "tend to corrupt morals", is not patently unconstitutional. Furthermore, neither it nor any

other State statute closely resembling it has been held invalid by the Supreme Court.

Of course if we had here (as in *Brown* v. *Kingsley Books*, 1 N Y 2d 177, affd. 354 U. S. 436) a case of hard core out-and-out pornography, our task would be simple enough. In *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495, 502) the Supreme Court rejected the absolutist idea that "The Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places". And, more specifically, in *Roth* v. *United States* (354 U. S. 476 —a criminal prosecution) the court flatly announced that "obscenity is not within the area of constitutionally protected speech" (p. 485, and see our similar holding in *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237). "Obscene material", the Supreme Court told us in *Roth* (*supra*, p. 487), is "material which deals with sex in a manner appealing to prurient interest". But "prurient interest" is subjective and various. The movie we are here dealing with, while it has for its main or only theme illicit sexual congress, is a film version of a novel of great fame by an eminent author and, says the Supreme Court, "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional freedom of speech and press" (*Roth* opinion, p. 487). The old *Hicklin* (*Regina* v. *Hicklin*, L. R. 3 Q. B. 360) test which examined into the publication's effect on "particularly susceptible persons" has been finally rejected (*Roth* opinion, p. 489). Now given the Supreme Court's approval is this test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*Roth* opinion, p. 489). That criterion is roughly the same as the one presented in *Butler* v. *Michigan* (352 U. S. 380, 382), that is, the influence of the product on a normal adult. I confess my own inability to determine whether or not an average person, applying to "Lady Chatterley's Lover" the undiscoverable standards of a hypothetical community would consider that the dominant theme of the whole film appealed principally to prurient interest or to artistic sensibilities or to a mature and adult interest in one of the lively arts. But one sure result of the *Roth*

decision was to disappoint both the extreme liberals who had hoped to spread the First Amendment's blanket over all speech whether obscene or not, and the extremists at the other end who despite the pluralist character of our society would make of the law a policeman enforcing their own ideas of morality and propriety.

Helpful as are the *Roth* decision's explanations of the constitutional limits of speech and press freedom (and see, [fol. 70] also, *Alberts* v. *California*, 354 U. S. 476, and *Kingsley Books* v. *Brown*, 354 U. S. 436, decided by the court on the same day), there are still large areas of uncertainty. The publications which were the subject matter of *Roth*, *Alberts* and *Kingsley* were actually pornographic and salacious, utterly lacking in "social importance" or value (*Roth* opinion, p. 484). So the Supreme Court was really passing only on the general constitutionality of State action against obscenity without finding it necessary to set down precise criteria for deciding whether a particular book or picture is obscene. It still remains true that the highest Federal court has never yet upheld any single instance of administrative censorship of a motion picture.

In the *Excelsior Pictures* case (3 N Y 2d 237, *supra*) our own court overruled the Regents' restraint of a nudist movie since the majority of this court considered the picture innocent and innocuous, merely unconventional in that it pictured activities of unclothed family groups in a secluded camp. In January of this year (*Sunshine Book* v. *Summerfield*, 355 U. S. 372) the Supreme Court, with no explanation beyond a reference to the *Roth* case (*supra*), held invalid the exclusion from the mails of a nudist magazine (also a magazine dealing with homosexuality—*One, Inc.*, v. *Olesen*, 355 U. S. 371). Presumably, the court having looked at those books simply held them not to be obscene. A few months earlier the court in *Times Film Corp.* v. *City of Chicago* (355 U. S. 35, *supra*) reversed a ban by the Chicago authorities on the French moving picture "Game of Love". That picture was from all accounts sexy in the extreme (see descriptions in the lower court opinions at 139 F. Supp. 837 and 244 F. 2d 432) and it had been denied exhibition under an ordinance condemning movies "immoral or obscene".

All this recent history suggests that the Supreme Court will insist that censorship for obscenity be "closely confined" (*Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*) especially as applied to works of any literary or dramatic merit or expressing "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (*Roth* opinion, p. 484, *supra*). Similarly, our own State Constitution says that: "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right". But we are still left with our own stern duty of upholding, if we can on reason and authority, our own State's statute.

It is of no great importance that the Regents in denying a license here did not use the word "obscene" nor is it necessarily determinative that this film is not obscene in the dictionary sense of being lewd, disgusting or loathsome or dealing directly and foully with the excretory or sexual [fol. 71] organs or functions. Our question is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say. Unquestionably, this motion picture would be considered obscene by many not illiberal moralists as objectively evidencing an intent by the author to arouse the viewer by emphasizing the sexually exciting elements of the story, a concept of obscenity not unlike the classic definition in *United States* v. *One Book Called "Ulysses"* (5 F. Supp. 182, 184; see my article, Legal Problems Involved in Censoring the Media of Mass Communication, in 40 Marquette L. Rev. 38, 55-56).

It still remains that the States have large remaining powers to apply reasonably related remedies to domestic evils (see *Butler* v. *Michigan*, 352 U. S. 380, 383, *supra*). The problem is not one of precise definition of "prior restraint" or "obscenity" or other word or phrase. A leading authority on legislation says that "the question should be not one of standards but rather whether censorship

should be permitted in the particular case regardless of the wording" (Control of Objectionable Publications—A Drafting Problem, 44 A. B. A. J. 175). To be examined is "the operation and effect of the statute in substance" (*Near* v. *Minnesota*, 283 U. S. 697, 713; *Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*). The "operation and effect" of subdivision 1 of section 122-a of our Education Law in this instance has been to keep from the screen a motion picture the theme of which is adultery, alluringly and approvingly depicted. Until the highest national tribunal says otherwise, we should let our statute so operate.

The order should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

Dye, J. (dissenting). When sections 122 and 122-a of the Education Law are read in the light of recent decisions dealing with administrative censorship of motion picture film, it seems clear that the learned Appellate Division, Third Department, quite properly annulled the determination of the Board of Regents and directed that a license issue for the showing of the motion picture entitled "Lady Chatterley's Lover".

As the record indicates, the Regents sitting as a Board of Review of its Division of Motion Pictures (an administrative agency empowered to censor motion picture film in advance of public showing, Education Law, §§ 122-132) affirmed a denial of the petitioner's application for a license to exhibit the film in question—*not conditionally*, unless [fol. 72] certain designated sequences were deleted, as directed by the acting director of the Motion Picture Division, but *absolutely* and *finally* in language reflecting the vague generality of the statute, viz., that "the said film is 'immoral' within the meaning of the provisions of Sections 122 and 122-a of the Education Law" (Journal of Regents meeting, Sept. 28, 1956).

The correctness of that ruling, which a bare majority of this court is about to approve, depends in the final analysis solely on whether the enforcement of sections 122 and 122-a (subd. 1) satisfies constitutional due process.

When the Regents relied on the term "immoral" and the phrase "tend to corrupt morals", as used in section 122, as

authority for banning the motion picture film *La Ronde*, the Supreme Court reversed, without opinion (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587), at the same time it decided *Superior Films* v. *Department of Educ. of Ohio* (346 U. S. 587), both on authority of *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495) which had sustained a prior attack on section 122 as being too vague and indefinite to satisfy constitutional safeguards by providing essential criteria and standards for the guidance of administrative discretion. To meet the consequential effect of that adverse ruling section 122-a of the Education Law (L. 1954, ch. 620) was enacted in an effort to more precisely define the term "immoral" and the phrase "tend to corrupt morals" as used in section 122 for the purpose of censorship as denoting "a motion picture film or part thereof, the dominant purpose or effect of which is *erotic* or *pornographic* or which portrays *acts of sexual immorality, perversion*, or *lewdness*, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior" (Education Law, § 122-a, subd. 1; emphasis supplied).

However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term "sacrilegious", "immoral", "tend to incite to crime", "prejudicial to the best interests", "harmful and indecent", all found too general and imprecise to meet constitutional standards (*Joseph Burstyn, Inc.*, v. *Wilson*, *supra*; *Matter of Commercial Pictures* v. *Board of Regents*, *supra*; *Winters* v. *New York*, 333 U. S. 507; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ. of Ohio*, 346 U. S. 587, *supra*; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term "immoral" as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term "immoral" as a basis for prior restraint, he necessarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion. As the learned

[fol. 73]

Justice, writing for the court below, succinctly pointed out: "A statute which leaves any field open to the opinion, discretion or individual point of view of a censor in barring a moving picture violates the Fourteenth Amendment".

No one contends that the film in question is obscene within the narrow legal limits of obscenity as recently defined by the Supreme Court in the application of which that court has said it is vital "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" (*Roth* v. *United States*, 354 U. S. 476, 488; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237, *supra*; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870, *supra*). This film is not being banned because of the manner in which the sequences are produced or because of any existing clear and present danger—elements which must be proven before prior restraint or subsequent punishment may be justified (*Dennis* v. *United States*, 341 U. S. 494; *Marsh* v. *Alabama*, 326 U. S. 501; *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*, 310 U. S. 88; *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359). The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance that the book, on which it is based, has long been published and circulated freely without benefit of administrative censorship. This they may not do: Since *Burstyn* and *Commercial Pictures* (*supra*), the essential particulars of section 122 have been deemed too vague and too indefinite to satisfy fundamental essentials of statutory validity, and these deficiencies have not been cured or supplied by anything contained in subdivision 1 of section 122-a. As I read it, the statute, as amended, continues to impinge on the constitutional guarantee afforded free speech and communication by the First and Fourteenth Amendments to the Federal Constitution.

A motion picture film should not be singled out as a subject for prior restraint under the beneficent guise of regulating community mores, any more than the prior censorship of press, books, the theatre or other media of communication which, as we know, includes a motion pic-

ture. Censorship under such guise is a type of paternalism that lends itself to the whim and caprice of the administrator. Whenever tested, censorship of motion picture film in advance has been disapproved. All but six States in the Union either do not have any film censorship in advance or have discontinued such practice. It should be noted that discontinuance of administrative censorship of motion [fol. 74] picture film in advance is not likely to create a vacuum for carte blanche exhibition of indecent films, so long as we have on our statute books appropriate penal laws to deal with the suppression of legally offensive motion picture film and the punishment of its exhibitors (cf. Penal Law, § 1141, 1141-a; Code Crim. Pro., § 22-a; *Brown* v. *Kingsley Books*, 1 N Y 2d 177, affd. 354 U. S. 436).

For these reasons and for the reasons so well stated by Judge Fuld with which I agree, I vote to affirm the judgment appealed from, with costs.

Fuld, J. (dissenting). In my opinion, an affirmance is compelled not only on the ground that the term "immoral," as defined in the Education Law, lacks that precision of meaning demanded by the Due Process Clause (see, e.g., *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587, revg. 305 N. Y. 336; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, revg. 244 F. 2d 432), but also for the reason that the film, "Lady Chatterley's Lover"—based on "a novel of great fame by an eminent author" (per Desmond, J., concurring, p. 367)—is not of a character which the First Amendment permits a state to exclude from public view. I agree, therefore, with what Judge Dye has said; but I would add these further thoughts on the more basic issue presented.

I cannot accept the premise underlying the opinions written for reversal on behalf of the majority, in other respects conflicting, that there is no meaningful distinction, so far as the doctrine of prior restraint is concerned, between a case involving post-publication prosecution and one involving prior administrative censorship. As I read the cases decided by the Supreme Court of the United States, legislation aimed at preventing the exhibition of moving pictures without advance approval by an administrative body, constituting as it does the clearest sort of

previous restraint, is to be sharply differentiated from a statute providing for prosecution after publication. (Compare *Roth* v. *United States*, 354 U. S. 476 [per Brennan, J.], pp. 494-495 [per Warren, Ch. J., concurring], with *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, *supra*.)

In reaching the conclusion that a system of prior administrative censorship is unconstitutional, I have in mind that even the limited injunctive process, with provision for prompt trial by the court, was recently regarded by four justices of the Supreme Court as an impermissible prior restraint. (See *Kingsley Books* v. *Brown*, 354 U. S. 436, 445-447.) Indeed, the majority of the court as well, after noting that "'the protection * * * as to previous restraint is not absolutely unlimited'", went on, significantly, to say, [fol. 75] "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship" (354 U. S., at p. 441). The latter is precisely what is here involved and the fact that a social problem is presented, which calls for solution, does not justify resort to unconstitutional means. As Chief Justice Warren wrote, in the course of his concurring opinion in *Roth* v. *United States* (354 U. S. 476, 495, *supra*), "To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Were we dealing with newspapers or books or with a stage play, there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distinguishing between such forms of expression and a moving picture. The Constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether orthodox or unorthodox, popular or unpopular, and its protection extends alike to words uttered in the street, a public hall or a theatre (with actors live or on a screen) and to words written in newspapers, books or motion picture subtitles. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed

by the airborne voice, the printed word or the still picture, it is put forward by a moving picture with a sound track. The First Amendment does not inquire whether the medium is visual, acoustic, electronic or one yet to be devised, nor does it seek to know the speed of dissemination or the size of the audience. In short, the Amendment's meaning and vitality may not be conditioned upon the mechanism involved, and the differences existing between a book and a moving picture do not support a holding that the freedom of expression assured by the Constitution is inapplicable to the moving picture.

I would, therefore, affirm the Appellate Division's order.

Van Voorhis, J. (dissenting). I agree with the Appellate Division and with my dissenting brethren that section 122-a of the Education Law is unconstitutional, in which event this problem play cannot be suppressed as "immoral". On the other hand, it would have been within the jurisdiction of the Regents (it seems to me) to have eliminated several passages in this picture as "obscene" under section 122. The Motion Picture Division of the Education Department attempted something of that sort in recommending that certain scenes be expurgated, but on the ground that they are "immoral". Although that ground is not available, and it is impossible to write off this entire drama as "mere pornography" (*Roth* v. *United States*, 354 U. S. 476), certain passages might have been eliminated as "obscene" without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Divi- [fol. 76] sion and the Regents seem to have overlooked their power to exclude "obscenity", which includes the portrayal on the public screen of sexual intimacies whether they be marital or extramarital. Thus, while concurring with the dissenting Judges to affirm the unconstitutionality of section 122-a, I would remit the matter to the Board of Regents to consider the aspect which I have mentioned before ordering them to issue a license for the exhibition of this picture without any expurgations.

Judges Froessel and Burke concur with Chief Judge Conway; Judge Desmond concurs in result in a separate opinion; Judges Dye and Fuld dissent and vote to affirm,

each in a separate opinion in which the other concurs and in both of which dissenting opinions Judge Van Voorhis concurs in part in a separate dissenting opinion for remission of the matter to the Board of Regents.

Order reversed, etc.

[fol. 77]

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of May in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

Witness, The HON. ALBERT CONWAY, Chief Judge, Presiding. RAYMOND J. CANNON, Clerk.

REMITTITUR May 15, 1958.

(Seal)

[fol. 78]

No. 309.

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Respondent,

For an Order &c.,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellants.

Be it Remembered, That on the 8th day of November in the year of our Lord one thousand nine hundred and fifty-seven, The Regents of the University of the State of

New York, the appellants in this cause, came here unto the Court of Appeals, by Charles A. Brind, Jr., and Louis J. Lefkowitz, Attorney General, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Kingsley International Pictures Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by London, Simpson & London, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 79] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles A. Brind, Jr., and Mrs. Ruth Kessler Toch, of counsel for the appellants, and by Mr. Ephraim S. London, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the determination of the Board of Regents confirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 80] Therefore, it is considered that the said order be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, May 15, 1958.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon, Clerk.

(Seal)

[fol. 81]

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Court House, Albany, New York, on the 2nd day of July, 1958.

Present: Hon. Isadore Bookstein, Justice.

In the Matter of the Application of

Kingsley International Pictures Corporation,
Petitioner-Respondent,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

The Regents of the University of the State of New York,
Respondents-Appellants.

Judgment on Remittitur—July 2, 1958

The above named respondents-appellants having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of this Court, Third Judicial Department, entered in the office of the Clerk of the County of Albany on the 1st day of August, 1957, which said order annulled, unanimously, the determination of the respondents-appellants, the Regents of the University of the State of New York, and further directed the respondents-appellants to issue a license for the exhibition of the motion picture film "Lady Chatterley's Lover"; and the

said appeal having been duly argued in the said Court of Appeals, by Charles A. Brind, Jr., Esq., and Mrs. Ruth Kessler Toch, Assistant Attorney General on behalf of respondents-appellants and by Ephraim S. London, Esq., on behalf of petitioner-respondent and after due deliberation the Court of Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be reversed, with costs, and the determination of the Regents of the University of the State of New York be confirmed, and having further ordered that the proceedings herein be remitted to this Court and [fol. 82] to be proceeded upon according to law; and the remittitur from said Court of Appeals having been filed herein;

Now, on motion of Charles A. Brind, Jr., Esq., attorney for the respondents-appellants herein, it is

Ordered, that the order of said Court of Appeals be, and the same hereby is, made the order and judgment of this Court, and that the said order of the Appellate Division of the Supreme Court, Third Department entered in the office of the Clerk of the County of Albany on the 1st day of August, 1957 be, and the same hereby is, annulled with costs.

/s/ Isadore Bookstein, J.S.C.

Enter

(Seal)

[fol. 83]

IN SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Petitioner (Appellant),

For an Order pursuant to Article 78 of the
Civil Practice Act,

—against—

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondents (Appellees).

NOTICE OF APPEAL—Filed July 30, 1958

To the Supreme Court of the United States

I. Notice is hereby given that Kingsley International Pictures Corporation, the Petitioner above named, hereby appeals to the Supreme Court of the United States (1) from the order of the Court of Appeals of the State of New York reversing the order of the Appellate Division of the Supreme Court of the State of New York, Third Department; (the order appealed from in effect denied Petitioner a license for the exhibition of its motion picture "Lady Chatterley's Lover"); and (2) from the final order and judgment of the above Court making the order of the Court of Appeals the order and judgment of the above Court. The order of the Court of Appeals appealed from was made and entered in this proceeding May 15, 1958, and the order and judgment of this Court was made and entered in this proceeding July 2, 1958.

[fol. 84] This appeal is taken pursuant to 28 U.S.C. Section 1257, subdivision 2.

II. The Clerk of the Supreme Court of the State of New York, County of Albany, will please prepare a transcript of the record of this cause and include in said transcript the following:

The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York;

The Remittitur from the Court of Appeals in this cause dated May 15, 1958;

The order of the Supreme Court of the State of New York held in the County of Albany, dated July 2, 1958, making the order of the Court of Appeals the order and judgment of the said Supreme Court of the State of New York.

III. The following questions are presented by this appeal:

1. Whether Sections 122 and 122-a.1 of the Education Law of the State of New York (pursuant to which the Petitioner's film "Lady Chatterley's Lover" was banned in the State of New York as "immoral") are so vague and indefinite that their enforcement violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Sections 120 to and including 132 of the Education Law of the State of New York, in setting up a system of censorship of motion pictures prior to their publication or exhibition, unlawfully inhibit freedom of expression and communication in violation of the First and Fourteenth Amendments to the Constitution of [fol. 85] the United States.

3. Whether Sections 122 and 122-a.1 of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States in authorizing the suppression of opinion. Appellant's film was banned in the State of New York because, as interpreted by the Respondents and the Court of Appeals, it condoned adultery under certain circumstances. The film was, for that reason, found to be "immoral." The majority of the Judges of the Court of Appeals did *not* find the film obscene, and the Justices of the Appellate Division for the Third Department of the State of New York found that the film is not obscene.

4. Whether Appellant was arbitrarily deprived of property rights and of its right of communication without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States by the refusal to permit the exhibition of its motion picture "Lady Chatterley's Lover" in the State of New York; the picture being a faithful and seemly film version of a major novel (written by an eminent and gifted author), published and widely circulated in the State of New York.

Dated, New York, July 25th, 1958

/s/ Ephraim S. London, Attorney for Appellant Kingsley International Pictures Corporation, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

(Seal)

[fol. 86] To: Charles A. Brind, Jr., Esq., Counsel to the Regents of the University of the State of New York, Appellees, State Education Building, Albany, N. Y.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, State Capitol, Albany, N. Y.

Hon. Donald L. Lynch, Clerk of the Supreme Court of the State of New York, County of Albany, County Court House, Albany, N. Y.

[fol. 87]

SUPREME COURT OF THE UNITED STATES

No. 394, October Term, 1958

KINGSLEY INTERNATIONAL PICTURES CORPORATION, Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

ORDER NOTING PROBABLE JURISDICTION—November 24, 1958

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 24, 1958